CHIHARU YABE (ZAUGG) & ANOR

v.

PENTADBIR TANAH WILAYAH PERSEKUTUAN KUALA LUMPUR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[ORIGINATING MOTION NO: R1-25-39-2001]
5 AUGUST 2002

LAND LAW: *Restraint on dealings - Restrictions in respect of non-citizens for purchase of property - Rejection of application to purchase property - Bumiputera quota - Whether applicable*

WORDS & PHRASES: *"Bumiputera quota" - Garis Panduan Perolehan Tanah oleh Warganegara Asing/Syarikat Asing 1998*

CIVIL PROCEDURE: *Appeal - Time - Limitation to file appeal - National Land Code, s. 418 - Whether appeal filed beyond limitation period - Whether to be dismissed*

ADMINISTRATIVE LAW: *Exercise of administrative powers - Discretion - Restrictions in respect of non-citizens for purchase of property - National Land Code, s. 433B - Requirement of approval from State Authority - Whether discretion vested in Land Executive Committee - Rejection of application to purchase property - Whether decision null and void*

Before this court, the appellants being foreign citizens appealed under s. 418 of the National Land Code ('NLC') against the decision of the Land Executive Committee ('LEC') in rejecting their application to purchase a property belonging to a Malay vendor. The LEC contended that the acquisition was prohibited by the Garis Panduan Perolehan Tanah oleh Warganegara Asing/Syarikat Asing 1998 ('the Guidelines') as the said property was covered by Bumiputera quota. It was also submitted that s. 433B of the NLC conferred the LEC with the discretion to do so and that the LEC was not fettered by the Guidelines. Additionally, counsel argued that the appeal ought to be struck out as it had been filed out of time and that the appellants had wrongly cited the Land Administrator as the respondent when their appeal was based on LEC's decision.

Held:

[1] The classification of Bumiputera quota does not apply to any land held by a Malay. Referring to the Guidelines, it would be relevant where the developer was required to reserve land subject to such a quota or where the land held by a Malay was alienated to a Bumiputera by the government. However, neither situations apply regarding the property in question. The LEC had misconstrued the definition, and erred in the application of Bumiputera quota to the said property. (pp 235 f, g, h & 236 a)

[2] Whilst the appellants had wrongly cited the Land Administrator as the respondent, such an error was purely technical. The Land Administrator was the officer and agent of the LEC. (p 236 e)

[3] Section 418 of the NLC requires the aggrieved party to appeal within three months from the date the decision is communicated to them. The appellant's appeal was filed four months thereafter and ought to be struck off. (p 236 h)

[4] Section 433B(1)(b) of the NLC provides that foreign citizens must obtain prior approval of the State Authority in seeking to acquire property and have it transferred to them. In regard to the Federal Territory of Kuala Lumpur, the Federal Territory (Modification of National Land Code) Order 1974 states that the State Authority appearing in the National Land Code would mean the Government of the Federation. (p 233 c)

[5] In the present case, the Government of the Federation had not delegated any of its powers held under s. 433B to the LEC. Thus, the LEC did not have the discretion to decide on the appellants' application and this rendered their decision to dismiss the said application null and void. This being so, the appellants could apply to the Government of the Federation to decide over their intended acquisition. (p 238 e)

[Appeal dismissed.]

Legislation referred to:
Federal Territory of Kuala Lumpur Land Rules 1995, Schedule 18
National Land Code, ss. 12(3)(b), 13, 418, 433B(1)(b)

Other source(s) referred to:
Garis Panduan Perolehan Tanah oleh Warganegara Asing/Syarikat Asing 1998, para 2A(v)

For the appellants - Harpal Singh; M/s AJ Ariffin, Yeo & Harpal
For the respondent - Mahammad Naser Desa SFC

Reported by M Maheswaran

JUDGMENT

Abdul Aziz Mohamad J:

This is an appeal under s. 418 of the National Land Code. The appellants are Japanese citizens, the first appellant being the daughter of the second appellant. They wanted to acquire a piece of land in the Federal Territory of Kuala Lumpur, on which is a double-storey bungalow, from the owner, and to that end they entered into a sale and purchase agreement with the owner. But the appellants being foreign citizens, for the land to be transferred to them, the prior approval of the state authority had to be obtained. That is required by s. 433B(1)(b) of the National Land Code. So they applied for approval, but their application was not approved. Aggrieved by the decision, they now appeal under s. 418.

Their application for approval was made in the form prescribed for the purpose in Schedule 18 to the Federal Territory of Kuala Lumpur Land Rules 1995. The application was directed to the Registrar of Titles of the Federal Territory of Kuala Lumpur, although according to the form in Schedule 18 it should have been directed to the Land Administrator, but nothing turns on this. The application was forwarded by the appellants' solicitors on 28 or 29 June 2000, also to the Registrar of Titles.

On 18 September 2000 the appellants' solicitors received from the Land Administrator written communication by letter dated 9 September 2000 that the Land Executive Committee of the Federal Territory of Kuala Lumpur did not approve the application. According to the Land Administrator, the decision of the Land Executive Committee was made on 25 August 2000.

In paras. 19, 20 and 21 of the affidavit in support of their appeal, which paragraphs are admitted by the respondent, the appellants say that on 20 October 2000 their solicitors filed the appellants' appeal for a review of the decision, which was supported by a letter dated 20 September 2000 from the vendor, that on 2 November 2000 the respondent wrote to the vendor seeking further evidence in support of the appeal, and that on 27 November 2000 the appellants' solicitors were informed by an officer of the Land Registry that the vendor had personally submitted the evidence requested for and that no further material was required for consideration of the appeal. Incidentally, in para. 19 the appellants incorrectly refer to the decision as that of the Land Administrator.

On 29 January 2001 the Land Administrator wrote to the vendor in reference to an application of his, to say that as the application did not comply with the conditions of the Garis Panduan Perolehan Tanah oleh Warganegara Asing/Syarikat Asing 1998 ("the Guidelines"), the application "tidak diluluskan

oleh Mesyuarat Jawatankuasa Kerja Tanah Wilayah Persekutuan, Kuala Lumpur". The letter was copied to the appellants' solicitors who received their copy on 14 February 2001.

It is not apparent from the appellants' affidavit why the Land Administrator's letter spoke of an application by the vendor. In support of paras. 19 and 20 of the appellants' affidavit, several letters are exhibited. One is the letter from the vendor dated 20 September 2000 that I mentioned before, which was to the Director General of the Department of Lands and Mines, Federal Territory. That letter referred to a letter (not exhibited) from the Director General to the appellants' solicitors without giving its date, and to an earlier letter (not exhibited) from the vendor dated 4 July 2000, well before the decision of the Land Executive Committee of 25 August 2000. The purpose of the vendor's letter of 20 September 2000 was to "membuat rayuan semula untuk menjual tanahmilik tersebut" on several grounds stated in the letter. Another letter exhibited in support of paras. 19 and 20 is a letter from the Land Administrator to the vendor dated 2 November 2000 that I mentioned before, asking for proof to support the grounds of the appellants' appeal. That letter refers to a letter from the vendor dated 6 October 2000 (not exhibited). The true position cannot be ascertained unless at least those three unexhibited letters are in sight. The possibility cannot be discounted that to the Land Administrator there was an appeal both from the appellants and the vendor and that the Land Administrator thought that to inform both parties of the result of the appeal it was sufficient to write to the vendor with a copy to the appellants' solicitors.

I should also mention that it is not clear from the Land Administrator's letter of 29 January 2001 whether it merely sought to explain why the Land Executive Committee had decided on 25 August 2000 not to approve the appellants' application or whether the Land Executive Committee actually met again to consider the appeal of the appellants or of the vendor or of both and decided not to allow the appeal. The letter of 29 January 2001 refers to an application and does not state the date of the Land Executive Committee's decision.

The appellants filed their present s. 418 appeal to the court on 23 April 2001.

In their affidavit in support of their appeal the appellants say that the rejection of their application was wrong in law because they had complied with the Guidelines, the Federal Territory of Kuala Lumpur Land Rules 1995 and the National Land Code.

It is not apparent from the Guidelines themselves as to who made them, but para. 5.3 of the Land Administrator's affidavit says that they were approved by the "Kerajaan". According to para. 2A(v) of the Guidelines, a foreign citizen cannot "membeli dan menangkap lelongan awam" a residential building of certain groups, one of which is "Kuota Bumiputera" (or "Bumiputera Quota").

In para. 5 of his affidavit, the Land Administrator says that the appellants' application was refused because the land belonged to the Bumiputera Quota and he gives the meaning of that term as used in the Guidelines as follows:

> apa-apa tanah yang dipegang oleh orang Melayu atau pribumi bagi Sabah dan Sarawak sama ada yang dibeli melalui peruntukan kuota jualan Bumiputera yang disyaratkan kepada pemaju atau yang diberimilik oleh kerajaan kepada Bumiputera/pribumi.

It is a fact that the vendor is a Malay and had bought the land from the developers, Syarikat Perumahan Pegawai Kerajaan Sdn Bhd.

The learned senior federal counsel submitted that a decision under s. 433B is a matter of discretion and that the Land Executive Committee, in making their decision on an application under the section, were not bound by the Guidelines. But the fact is that according to the Land Administrator the Land Executive Committee based their decision on the guidelines and on their understanding of the meaning of "Bumiputera Quota" as set out by the Land Administrator. As a decision based on the meaning of the term, I think the decision was wrong.

According to the Land Administrator's words that I have quoted, the meaning of "Bumiputera Quota" could be one of several. It could be any land held by a Malay. I would dismiss that outright. It cannot be that any land held by a Malay is a land of Bumiputera quota. Such a meaning fails to give regard to the significance of the word "quota". Another meaning could be any land held by a Malay that he bought from developers out of a quota that they were required to reserve for sale to Bumiputeras. If that meaning is correct, it does not apply to the land in this case because there is no evidence that the land that the vendor bought from the developers was from such a quota. There is no evidence even that the developers were required by any authority to reserve such a quota. Yet another meaning of "Bumiputera Quota" according to the words quoted is land held by a Malay that was alienated to a Bumiputera by the government. If that meaning is correct, it does not apply to the land in this case because, as far as the vendor is concerned, the land was not alienated to him by the government and, as far as the developers are concerned, there is no evidence that the land was alienated to them by the government and, in any case, they are not a bumiputera.

The decision to refuse the applicants' application was therefore made on a perceived meaning of "Bumiputera Quota" that is either not correct or, even if correct, does not apply to the land in question.

The senior federal counsel submitted that a decision of the Land Executive Committee is not appealable under s. 418 because the section is only concerned with "any decision under this Act of the State Director, Registrar and any Land Administrator". But "State Director" was a change of name from "State Commissioner" that was effected by the National Land Code (Amendment) Act 1984 (Act A587), and according to the schedule to the Federal Territory (Modification of National Land Code) Order 1974 (P.U.(A) 56 of 1974), "state commissioner" shall be construed as "Land Executive Committee". When "State Commissioner" was designated "State Director" in 1984, the construal for the Federal Territory of the State Commissioner as the Land Executive Committee must also follow as regards the State Director. Therefore, for the Federal Territory, in s. 418 "State Director" must read "Land Executive Committee". A decision of the Land Executive Committee is therefore included in the section.

The senior federal counsel submitted that the wrong party, the land administrator, had been named as respondent in the appeal because the decision by which the appellants were aggrieved was a decision of the Land Executive Committee and not that of the land administrator. That is correct. The respondent should have been the Land Executive Committee. But I do not think that this error should be held fatal to the appeal. It is a purely technical error. The land administrator is the officer and agent of the Land Executive Committee. He knows that the appeal has to be against the decision of the Land Executive Committee, and through him the Land Executive Committee are aware of the appeal. It would not prejudice anyone to treat the Land Executive Committee as the respondent. If the respondent had been the Land Executive Committee at the outset, they would also be represented by a senior federal counsel.

There is, however, another point raised by the senior federal counsel on which, I think, he must succeed, and that is that the appeal is out of time. According to s. 418, a person aggrieved by a decision may appeal from it "at any time within the period of three months beginning with the date on which it was communicated to him". The communication of the Land Executive Committee's decision of 25 August 2000 was received by the appellants' solicitors on 18 September 2000. The appeal was filed on 23 April 2001, four months beyond the period for appealing. The appellants' counsel argued that time should be reckoned from 14 February 2001, the date when the appellants' solicitors received a copy of the letter of the land administrator to the vendor that disposed of the "appeal" as regards the Land Executive Committee's decision of 25 April 2000.

I have, for the sake of completeness, stated the events leading to that letter and made observations about the "appeal", particularly as to the involvement of the vendor in it and as to whether the Land Executive Committee actually met again to consider the appeal. But all that, as I said, is for the sake of completeness and none of it needs to be taken into consideration in arriving at my decision on this point, because I am of opinion that, in any case, time should be reckoned from 18 September 2000, the date when the original decision of the Land Executive Committee was communicated to the appellants. That, in my opinion, is the "decision" for the purposes of s. 418. There is in the legal sense no appeal from that decision except to the court under s. 418 and any subsequent decision of the Land Executive Committee made, shall I say, upon a plea to reconsider cannot be recognised as a "decision" for the purposes of s. 418. An aggrieved person might well wish to attempt to persuade the decision-maker to change his mind and the decision-maker, as an administrator, might well administratively entertain the request and not adopt a strictly legal stand and tell the person forthwith that he has made his decision and if the person is aggrieved by it he should appeal under s. 418, but the person ought, to preserve his right to the legal appeal under that section, at the same time file his appeal before the expiry of the period for appealing, if he does not get, or it is not possible to get, a decision in his favour on the plea for reconsideration before the expiry of the period.

For the reason that it is out of time, I have to dismiss the appeal.

But that need not be the end of the road for the appellants.

In arguing that the Land Executive Committee, in making their decision under s. 433B, had a discretion and was not fettered by the guidelines, the senior federal counsel equated the Land Executive Committee with the state authority, which is the authority to give the approval under s. 433B. I had therefore to satisfy myself as to how it was that, the approving authority in s. 433B being the state authority, it was the Land Executive Committee that decided the appellants' application for approval.

I find that, according to the Federal Territory (Modification of National Land Code) Order 1974, for the Federal Territory of Kuala Lumpur references in the National Land Code to the "State Authority" have to be construed as references to "the Government of the Federation". That means that, for the Federal Territory of Kuala Lumpur, the Government of the Federation is the approving authority in s. 433B in place of the state authority, and not the Land Executive Committee.

Section 13 of the National Land Code gives the power of delegation to the state authority and therefore, for the Federal Territory, to the Government of the Federation, and in exercise of that power the Government of the Federation has, by P.U.(B) 597 of 1974, delegated the exercise of its powers under certain sections of the National Land Code to the Land Executive Committee, but s. 433B is not included in that notification. There is no other such notification for s. 433B and the senior federal counsel has confirmed that the Government of the Federation has not delegated its powers under s. 433B to the Land Executive Committee. The senior federal counsel, however, added that according to s. 12(3)(b) of the National Land Code, as modified by the aforesaid 1974 Order of modification, the Land Executive Committee are required to act in accordance with any direction given to them by the Government of the Federation, and that the guidelines constitute directions given by the Government of the Federation to the Land Executive Committee to be followed when considering an application under s. 433B. But that is a matter that concerns the manner of exercising the powers under s. 433B by the Land Executive Committee when they are invested with the powers, and until there is a delegation under s. 13 they are not invested with the powers.

Therefore, as the law stands at present, when the Land Executive Committee decided the appellants' application on 25 August 2000, they had no power to do so and the decision is null and void. That being so, the appellants' application has not been decided and is yet to be decided and the authority that is empowered to decide the application, as the law stands at present, is the Government of the Federation. It is up to the appellants now to endeavour to have their application decided by the Government of the Federation.

I dismiss the appeal for the reason that it is out of time, but since the decision that the appellants are appealing from is null and void, I make no order as to costs.